



U.S. Citizenship
and Immigration
Services

B6

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: SEP 23 2004

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwanted
information from being
released

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical office. It seeks to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 22, 1999. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour, which amounts to \$20,800.00 annually.

The evidence relevant to the petitioner's ability to pay the proffered wage submitted initially and in response to two requests for evidence consists of the following: a copy of the articles of incorporation of the petitioner, dated October 9, 1991; a copy of a Los Angeles County Fictitious Business Name Statement dated April 29, 1999 for the petitioner's business name of [REDACTED] copy of a Medical Board of California Fictitious Name Permit dated October 27, 1999 in the name Glendale Doctors Medical Center, Inc.; copies of the petitioner's Form 1120 U.S. income tax returns for an S corporation for 1999, 2000, 2001 and 2002; a copy of transmittal letter dated January 5, 2004 to the petitioner from [REDACTED] Internal Revenue Service, with attached IRS transcripts of the petitioner's Form 1120S tax returns for 1999, 2000, 2001 and 2002; a copy of the articles of incorporation of [REDACTED] dated May 26, 1995; a copy of a City of Los Angeles Tax Registration Certificate issued December 29, 2001 to [REDACTED] copies of Form 1120 U.S. income tax returns for an S corporation for [REDACTED] Inc., for 2001 and 2002; monthly statements for two accounts [REDACTED] at the Bank of America [REDACTED] San Francisco, CA covering the period January 2001 through May 2003; a copy of

an undated letter from the petitioner's owner explaining the relationship between the petitioner and Sahar Al-Dossary, M.D., Inc.; and a copy of a decision of the AAO dated January 17, 2002 in an appeal in an unrelated case, discussing the issue of depreciation.

In addition to the foregoing evidence the record before the director included evidence concerning the beneficiary's education and experience, matters which are not at issue in the instant appeal.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Most of the documents submitted on appeal are additional copies of documents submitted previously for the record. The only documents submitted for the first time on appeal are copies of documents which were apparently submitted to the Employment and Training Administration of the U.S. Department of Labor in support of the labor certification. None of the documents submitted for the first time on appeal are relevant to the petitioner's ability to pay the proffered wage. Accordingly, the AAO will evaluate the decision of the director based on the evidence in the record submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record indicates that the petitioner is an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the Form 1120S U.S. Income Tax Return for an S Corporation. The petitioner's tax returns show the following amounts for ordinary income: \$76,679.00 for 1999; \$139,732.00 for 2000; \$91,579.00 for 2001; and \$35,108.00 for 2002. Each of those figures is larger than the proffered wage of \$20,800.00. Nonetheless, for the reasons discussed below, the copy of the petitioner's tax return for 2001 in the record is not considered to be reliable evidence of the petitioner's tax return for that year.

In denying the petition, the director noted that the figure for the petitioner's ordinary income shown on its Form 1120S tax return for 2001 is different from the figure shown on the IRS computer transcript of the petitioner's

Form 1120S tax return for 2001, which shows ordinary gross income of \$17,586.00. The director's decision includes no discussion of the possible reasons for the difference between the figure on the copy of the Form 1120S and the figure on the IRS computer transcript. The director simply states, "The IRS transcripts are clearly the more objective evidence." Based on the IRS transcript figure of \$17,586.00 the director concluded that the petitioner's adjusted gross income in 2001 was insufficient to pay the proffered wage of \$20,800.00. In his decision the director then goes on to reject counsel's argument that depreciation should be considered as part of the petitioner's ordinary income.

The apparent explanation for the difference between the IRS transcript for 2001 and the copy of the petitioner's Form 1120S tax return in the record is that the copy of the petitioner's Form 1120S for 2001 in the record is an amended return. The IRS transmittal letter accompanying the transcripts states that a tax transcript contains only information found on the forms and schedules of a tax return as originally submitted, and that a transcript "will not include changes made after the return's filing." The letter states that the filing of an amended return would be one of the changes which would not appear on a tax transcript. Letter from Christine Winningham, Internal Revenue Service to the petitioner (January 5, 2004).

For this reason, an IRS transcript may not necessarily reflect the final version of a taxpayers tax return for a given year.

The petitioner's evidence contains no explanation for the changes in the petitioner's tax return for 2001 as shown on the petitioner's amended Form 1120S. The copy of the amended Form 1120S for 2001 in the record is signed in pencil by the petitioner's owner, and is undated. That copy was submitted in response to a request for evidence (RFE) of the director dated July 18, 2003, which followed an earlier RFE dated March 27, 2003. Both RFE's had requested evidence of the petitioner's ability to pay the proffered wage from 2001 to the present.

The record contains no evidence that the petitioner's amended Form 1120S for 2001 has been filed with the IRS. Moreover, the petitioner's amended return for 2001 appears to be incomplete. One change from the IRS transcript is the entry on line 5 of the 2001 amended return showing "other income" in the amount of \$111,132.00. No figure for "other income" appears on the IRS transcript for 2001. Line 5 of the Form 1120S contains the instruction "attach schedule." Yet the 2001 amended return in the record contains no schedule corresponding to the figure for "other income" as stated on line 5 of that return.

The copies of the petitioner's Form 1120S for 1999, 2000 and 2002 contain no amounts on line 5 for "other income," and they therefore provide no basis on which to infer the nature of the petitioner's "other income" for 2001.

Another change on the 2001 amended return from the IRS transcript is the entry on line 13 of the amended return showing a deduction for interest in the amount of \$12,856. The transcript for 2001 shows an entry of zero on line 13 for interest deduction. The copies of the petitioner's other tax returns show interest deductions in much smaller amounts than on the 2001 amended return: \$516.00 for 1999, zero for 2000 and zero for 2002. The record contains no explanation for the significantly higher interest deductions claimed by the petitioner on its 2001 amended return.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Because of the lack of evidence that the amended return has been filed with the IRS, the lack of a date on the amended return, the absence of explanation for the changes shown on the petitioner's amended Form 1120S, the incomplete information on that return, and the inconsistencies with the petitioner's other returns, the amended return cannot be accepted as reliable evidence of the petitioner's tax return for 2001. The director was therefore correct in relying on the IRS transcript as the more accurate evidence of the petitioner's tax return for 2001. As noted above, the petitioner's ordinary income shown on the IRS transcript for 2001 of \$17,586.00 is less than the proffered wage of \$20,800.00. The petitioner's ordinary income for 2001 is therefore insufficient to establish the petitioner's ability to pay the proffered wage that year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

As discussed above, the petitioner's ordinary income figures on its tax returns for 1999, 2000 and 2002 are sufficient to establish the petitioner's ability to pay the proffered wages in those years. For each those years the IRS transcripts show the same figures for ordinary income as do the returns. Only for the year 2001 does the evidence require a consideration of the petitioner's net current assets. The IRS tax transcripts contain no information on the petitioner's current assets and current liabilities, therefore the only source for that information is in the copies of the petitioner's Form 1120S in the record. For the reasons discussed above, however, the petitioner's amended Form 1120S for 2001 is not considered to be reliable evidence of the petitioner's tax return for that year. Nonetheless, calculations based on the figures on the petitioner's Form 1120S tax return for 2002 for assets and liabilities at the beginning of the year yield a figure for net current assets of -\$24,475.00. That figure may also be taken as the net current assets for the end of the year 2001. But since that figure is negative, it fails to establish the ability of the petitioner to pay the proffered wage during 2001.

For the foregoing reasons, the petitioner's tax returns and IRS transcripts fail to establish the ability of the petitioner to pay the proffered wage during 2001. No other financial evidence pertaining to the petitioner is found in the record.

The record also contains financial evidence pertaining to another entity [REDACTED]. However purported explanations of the relevance of that evidence in an undated letter from the petitioner's owner and in counsel's brief fail to clarify the relationship between the petitioner and [REDACTED].

The undated letter from the petitioner's owner was submitted for the record in response to a request for evidence dated March 27, 2003, and was submitted along with other documents under a cover letter from counsel dated June 9, 2003. In his letter the owner states that [REDACTED] Inc. and the petitioner are the same company. The owner states that in 2001 he decided to change the name of the petitioner to [REDACTED] M.D., Inc. The owner states that [REDACTED] is the spouse of the owner, and that the owner and his spouse have been the principal physicians of the petitioner. The owner states that in addition to the name change of the petitioner, "the Employer Identification Number was also changed but only for tax purposes." Letter from petitioner's owner to CIS (c. June 9, 2003).

No documentation in the file corroborates the purported name change of the petitioner. The owner's assertion on this point, in fact, is inconsistent with articles of incorporation in the record. Articles of incorporation dated October 9, 1991 show the petitioner as a newly formed corporation, and no amendment to those articles showing any name change is found in the record. Articles of incorporation dated May 26, 1995 show Sahar Al-Dossary, M.D., Inc. as a separate, newly formed corporation on that date.

The employer identification numbers of the petitioner and of [REDACTED] Inc. as shown on the tax returns in the record are different, which is further evidence that the petitioner and [REDACTED] M.D., Inc. are two different legal entities.

Counsel's brief fails to clarify the relationship between the petitioner and [REDACTED]. In his brief counsel states at one point that [REDACTED] Inc. is a "subordinate" of the petitioner. See Brief, page 3. One page later counsel states the petitioner and [REDACTED] Inc. are both "subordinates," and that they are separate legal entities. These assertions of counsel are inconsistent with a previous assertion of counsel made in a letter dated June 9, 2003 that the petitioner "is doing business as Sahar [REDACTED] Letter from Counsel, June 9, 2003, page two. Moreover, counsel's assertion in the June 9, 2003 letter is inconsistent with a Fictitious Business Name Statement dated April 29, 1999 showing the petitioner doing business under the fictitious business name "Glendale Doctors Medical Center." Counsel fails to clarify what he means by referring to the petitioner and [REDACTED] Inc. as "subordinates." Even if were assumed that counsel intends to describe those two entities as "subsidiaries," counsel fails to state the name of any corporation of which those two entities are subsidiaries. Moreover, counsel's assertions regarding the two corporations are not supported by evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

For the foregoing reasons, the evidence fails to establish that the financial information pertaining to [REDACTED] is relevant to the issue of the petitioner's ability to pay the proffered wage. Rather, the evidence indicates that [REDACTED] is an independent corporation, separate from the petitioner. Nothing in the governing regulation at 8 C.F.R. § 204.5 allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar v. Ashcroft*, (2003 WL 22203713 (D. Mass)). Therefore, the evidence pertaining to [REDACTED] Inc. provides no support to help establish the petitioner's ability to pay the proffered wage during the relevant period.

In his decision, the director correctly ignored the evidence pertaining to [REDACTED]. The director also correctly rejected counsel's assertion that depreciation expenses of the petitioner should be considered as additional financial resources available to the petitioner to pay the proffered wage.

As noted above, the evidence submitted for the first time on appeal consists solely of documents pertaining to the labor certification process before the U.S. Department of Labor. None of those documents contain information relevant to the petitioner's ability to pay the proffered wage. Moreover, none of the assertions of counsel in his brief establish any error by the director in his analysis of the evidence submitted prior to the director's decision. Counsel's submissions on appeal therefore fail to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.